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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1101

CATALANO, INC.,
ET AL., *Petitioners,*

vs.

TARGET SALES, INC.,
ET AL., *Respondents.*

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSOURI, MONTANA, NEBRASKA, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, TENNESSEE, TEXAS, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND THE COMMONWEALTHS OF MASSACHUSETTS, PENNSYLVANIA AND VIRGINIA AS AMICI CURIAE

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INTEREST OF AMICI CURIAE

The States of Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Vermont, Washington, West Virginia, Wisconsin, and the Commonwealths of Massachusetts, Pennsylvania and Virginia respectfully submit this brief *amici curiae* on a petition for a writ

of certiorari to the United States Court of Appeals for the Ninth Circuit pursuant to Supreme Court Rule 42 (4).

The *amici* states play an important role in antitrust enforcement. They have enacted and enforced laws prohibiting unreasonable restraints of trade or commerce within their borders; those laws are construed consistently with this Court's interpretation of the federal antitrust laws. Congress has recently enhanced this role by empowering the states to sue as *parens patriae* to recover damages for violations of the Sherman Act on behalf of their citizens, 15 U.S.C. § 15(c), and by authorizing substantial appropriations for antitrust enforcement by state attorneys general. 42 U.S.C. § 3701.

The *amici* states also purchase a wide range of goods and services. In 1976 alone, the 50 states and their political subdivisions spent approximately $153.7 billion for goods and services. *Council of State Governments, The Book of the States* 276 (1978-79). Like any purchaser, the states are injured by overcharges resulting from antitrust violations; to redress such injuries they have vigorously prosecuted antitrust actions for monetary and injunctive relief. *See National Association of Attorneys General, State Antitrust Laws and Their Enforcement* (1974).

Accordingly, the *amici* states, in both their sovereign and proprietary capacities, have direct and substantial interests in the standards for enforcement of the antitrust laws against anticompetitive, concerted conduct.

QUESTION PRESENTED

Does an agreement among competitors to eliminate trade credit, effectively increasing the price of goods sold by them, constitute a *per se* violation of section 1 of the Sherman Act, 15 U.S.C. § 1?

STATEMENT OF THE CASE

Petitioners are beer retailers in the Fresno, California area. Respondents are beer wholesalers who together control the market for wholesale beer sales in that area.

Pursuant to California law, the wholesale beer prices respondents charge must be approved by the California Department of Alcoholic Beverage Control. California Business and Professions Code § 25000 *et seq.* Once approved, those wholesale prices are published in trade journals and apply to all wholesale transactions until new prices are filed by the wholesaler and approved by the Department. *Id.* California law also sets 30 and 42-day limits on the free trade credit that may be offered by beer wholesalers. California Business and Professions Code § 25509. As a result of this price regulation, competition between wholesalers has been effectively limited to the short-term trade credit they offer.

Before October 1967, Fresno beer wholesalers competed with each other by offering retailers trade credit deferring payment for periods ranging from 15 to 30 days. In 1967, however, the competing wholesalers allegedly agreed to eliminate short-term trade credit. Petitioners brought this action in November 1972, to

recover for damages incurred as a result of the wholesalers' horizontal conspiracy to eliminate the credit formerly granted to them.

Petitioners sought an order from the district court declaring that the alleged credit-fixing agreement, if proved, would constitute a *per se* violation of section 1 of the Sherman Act. 15 U.S.C. § 1. The district court held that the alleged conspiracy would not constitute a *per se* violation, but certified that determination for interlocutory review pursuant to 28 U.S.C. § 1292(b). At the same time, the district court entered summary judgment against two petitioners on the basis of no injury in fact. Petitioner Catalano appealed from that decision, and the two appeals were consolidated.

In a 2 to 1 decision, the Ninth Circuit affirmed the district court's holding that the alleged conspiracy was not a *per se* violation of section 1 of the Sherman Act. *Catalano, Inc. v. Target Sales, Inc.*, 605 F.2d 1097 (9th Cir. 1979). Characterizing credit as "a 'non-price' condition of sale," the majority held that an agreement among competitors to fix credit terms is not subject to *per se* analysis. 605 F.2d at 1099. At the same time, however, the Court of Appeals found that petitioners had made an adequate showing of damages flowing from the alleged credit-fixing agreement to establish injury in fact and reversed the summary judgment which the district court had entered against certain petitioners. 605 F.2d at 1101-02.

Judge Blumenfeld concurred on the issue of injury in fact, but dissented from the majority's determination of the *per se* issue. 605 F.2d at 1102. He concluded that the alleged agreement to eliminate trade credit was "plainly anticompetitive in its nature

and necessary effect" and should be held unlawful *per se*. 605 F.2d at 1104.

Petitioners' petition for rehearing and suggestion for rehearing en banc were denied on October 23, 1979. A petition for a writ of certiorari was filed in this Court on January 15, 1980.

REASONS FOR GRANTING THE WRIT

A. *The Ninth Circuit's Decision Is in Direct Conflict with The Applicable Decisions of This Court and Other Courts of Appeals.*

1. The Majority Erroneously Assumed That Credit Is Not A Component of Price.

At issue here is a horizontal agreement among wholesalers to eliminate trade credit in a market they control. Both this Court[1] and Congress[2] have long recognized that credit is a component of price. In this case, the existence of a state scheme of mandatory territorial restrictions and price posting made credit especially important as a market variable, and the record shows that prior to their agreement wholesalers had competed for business by lowering the overall prices paid by retailers through the extension of credit.

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[1] *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977); *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *Hogg v. Ruffner*, 66 U.S. (1 Black) 115, 118-19, 17 L. Ed. 38 (1861).

[2] *E.g.*, 15 U.S.C. § 1601 *et seq.* (Consumer Credit Protection Act). Because money received today is more valuable than the same amount received thirty days later, it is common commercial practice to allow a credit for early payment and to exact interest for a delayed payment. This principle has been recognized in the rules promulgated by this Court with respect to interest on judgments sustained on appeal. Rule 56(a), Rules of Supreme Court; Rule 37, Federal Rules of Appellate Procedure. It has also been recognized in the enactments of Congress. *E.g.*, 16 U.S.C. §§ 6601-6612 (interest allowed on overpayments and underpayments of federal income tax).

The concerted action of the wholesalers eliminating trade credit restrained the only price competition which had prevailed at the wholesale level. Unaccompanied by any lowering of wholesale prices, the elimination of credit necessarily had an inflationary impact on the overall price paid by the retailers. Indeed, this inflationary impact on price is evident from the majority's paradoxical holding that ecomomic damage to the retailers resulted from the wholesalers' concerted elimination of credit. 605 F.2d at 1101-02.

By stating that credit is "a 'non-price' condition of sale," 605 F.2d at 1099, the Court of Appeals defined the term "price fixing" in its most literal and narrow sense and failed to analyze the substantive character of the agreement, as required by this Court in *Broadcast Music, Inc. v. Columbia Broadcasting System,* ___U.S.___, 99 S. Ct. 1551 (1979). In so doing, the majority departed from the standards of antitrust analysis established by this Court and reached a result that is flatly contradicted by the facts of the case, the economic realities of the marketplace, and their own holding that economic injury in fact flowed from the challenged agreement to cut off credit. As Judge Blumenfeld stated in dissent, "This was a naked agreement among competitors to fix credit—a restraint which serves no economic purpose other than

to affect prices." 605 F.2d at 1103 (Blumenfeld, J., dissenting).[3]

2. A Horizontal Conspiracy to Raise Prices by Eliminating Trade Credit Is And Should Be Unlawful *Per Se.*

Under the applicable decisions of this Court and the Courts of Appeals,[4] a horizontal conspiracy to raise prices by eliminating trade credit appropriately lies within the *per se* category. Because of the unique role price plays in our economic system, agreements affecting price among competitors are considered to have "[a] pernicious effect . . . and lack of redeeming virtue [and] are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1, 5 (1968). *Accord, Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* ___U.S.___, 99 S. Ct. 1551, 1562 (1979), *quoting United States v. United States Gypsum Co.,* 438 U.S. 422, 436 n.13 (1978). Thus, since they restrain a key form of competition, horizontal agreements concerning prices are *per se* unlawful. *National Society of Professional Engineers v. United States,* 435 U.S. 679, 690 (1978); *Standard Oil Co. v. United States,* 221 U.S. 1, 52-60 (1910).

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[3] Even if credit were not a component of price, a horizontal agreement among suppliers not to offer credit would be no less anticompetitive. Such an agreement would constitute a concerted refusal to deal, which has long been considered a *per se* violation of the antitrust laws. *Radiant Burners v. Peoples Gas, Light and Coke Co.,* 364 U.S. 656 (1961); *Klors v. Broadway-Hale Stores,* 359 U.S. 207 (1959).

[4] *See* text and cases at page 8 *infra.*

That the agreement in question was to eliminate only one component of price competition does not remove it from the *per se* rule. A horizontal conspiracy to fix, stabilize or raise prices strikes at the central nervous system of the economy whether it is effectuated by an agreed-upon price schedule, *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), a ban on competitive price bids, *National Society of Professional Engineers v. United States,* 435 U.S. 679 (1978); *United States v. Texas State Bd. of Public Accountancy,* 592 F.2d 919 (5th Cir.), *cert. denied,* 100 S. Ct. 262 (1979), the purchase of surplus supplies, *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940), an agreement that fixes credit terms, *see Plymouth Dealers' Ass'n of Northern California v. United States,* 279 F.2d 128, 134 (9th Cir. 1960), or the elimination of credit terms, *Wall Products Co. v. National Gypsum Co.,* 326 F. Supp. 295 (N.D. Cal. 1971). The harm lies in the agreements' restraining competitors "ability to sell in accordance with their own judgment." *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 213 (1951). Even an agreement which is not "price-fixing as such" but which " 'interfere[s] with the setting of price by free market forces' is illegal on its face." *National Society of Professional Engineers v. United States,* 435 U.S. at 692. Thus, an agreement to eliminate short-term credit, which directly bears upon price, is price-fixing within the scope of the *per se* rule.

3. The Ninth Circuit's Decision Departs Radically from The Established Standard for Sherman Act Analysis.

Rather than follow the well-established precedent of this Court and the Courts of Appeals, the majority fashioned its own standard for Sherman Act analysis, ruling that a horizontal agreement to fix credit would violate the antitrust laws only "when made pursuant to a conscious purpose to fix prices or as part of an overall scheme to restrain competition." 605 F.2d at 1100. This Court determined in *United States v. United States Gypsum Co.,* 438 U.S. 422 (1978), that even in a criminal context there is no requirement to show a conscious purpose to fix prices. *Id.* at 444 n.21. Moreover, in *Gypsum* this Court restated the general rule that a Sherman Act violation can be established in a civil action by proof of an anticompetitive effect. *Id.* at 436 n.13. Further, in *National Society of Professional Engineers v. United States* this Court stated that even when it does not fit squarely within the literal definition of price fixing "an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face." 435 U.S. at 692-93. Such a radical departure from this Court's rulings on an important question of federal law justifies issuing the writ of certiorari.

B. *The Ninth Circuit's Decision Will Undermine Both State And Private Antitrust Enforcement.*

The incorrect ruling of the Ninth Circuit has generated substantial uncertainty in the field of antitrust enforcement. One principle of antitrust law which had been generally understood before this unfortunate decision is that agreements among competitors on the

prices of their individual products and services are forbidden. The certainty of this rule is more than a judicial aid to antitrust enforcement; the Sherman Act places combinations which tamper with price structures "beyond the pale," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-222 (1940), and this Court has long recognized that any change in that rule must be made by Congress. *Id.* at 222. *Accord, United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485, 489 (1950).

In holding that a horizontal agreement to raise prices by eliminating credit is not unlawful unless it is proven to be "pursuant to a conscious purpose to fix prices or as part of an overall scheme to restrain competition," 605 F.2d at 1100, the Ninth Circuit has invited wholesale violation of the antitrust laws through agreements which fix or eliminate any term of sale but the actual invoice price. Conscientious businessmen acting in good faith will no longer have the benefit of a uniformly applied, easily understood rule forbidding horizontal price agreements. Those injured by such agreements who seek redress under the antitrust laws will face prolonged and expensive litigation. As this Court has long recognized,

> [The] principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an

> inquiry so often wholly fruitless when undertaken. *Northern Pacific Ry. Co. v. United States*, 356 U.S. at 5.

By establishing a burden of proof which requires an "incredibly complicated and prolonged economic investigation" before horizontal restraints on prices are held unlawful, the Court of Appeals' opinion undermines both state and private antitrust enforcement. Case by case adjudication of price restraints based upon the Ninth Circuit's analysis is beyond the resources of both injured private parties and state attorneys general. Consequently, unless the Court of Appeals' decision is reversed, enforcement of the antitrust laws will be significantly undermined.

CONCLUSION

WHEREFORE, the *amici* states respectfully submit that the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

DATED this 28th day of January, 1980.

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